Case No. 92-330

Supreme Court, U.S.
FILED
JUN 2 1992
OFFICE OF THE CLERK

SUPREME COURT

OF THE

UNITED STATES

June Term, 1992

O.J. Collins ..... PETITIONER

v.

Commonwealth of Kentucky ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Brief for Petitioner

W. SIDNEY TRIVETTE
P.O. Box 2744
Pikeville, Kentucky 41502
(606) 432-3776
Attorney for Petitioner

QUESTION PRESENTED

I. The State of Kentucky's failure to indict the Defendent within eighteen (18) months of a shooting denied the Petitioner a speedy prosecution under the Sixth Amendment of the United States Constitution.

TABLE OF CONTENTS

Questions Presented 1

Table of Contents 2

Cases Cited 3

Petition for Writ of Certiorari 4

The Opinion Below 5

Jurisdiction 5

Constitutiona Provisions Involved 5

Statutes and Rules Involved 5

Statement of the Case 6

Reasons for Granting the Writ 7-8

Conclusion 9

Certificate of Service 9

Appendix. 10

A - Opinion of the Court Below . . . . . 1a - 3a
B - Order of the Court below Denying
Petition for Rehearing 4a

CASES CITED

Page

Cain v. Smith
686 F. 2d 374 (Sixth Circuit, 1982) 7

United States v. Greene,
737 F. 2d 572 (Sixth Circuit, 1984) 8

United States v. Lovasco
431 U.S. 783, 97 S. Ct. 2044 (1970) 8

United States v. Marion,
404 U.S. 307, 92 S.Ct. 455 8

West v. Black,
383 Fed. Supp. 1256 (1974) 8

UNITED STATES CONSTITUTION CITED

Sixth Amendment 5

STATUTES CITED

28 U.S.C.S. § 2104 5

Kentucky Revised Statutes 5

SUPREME COURT OF THE UNITED STATES
June Term, 1992

No. _____

O.J. Collins ..... PETITIONER

v.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the judgement of the Court of Appeals of Kentucky entered on August 30, 1991.

A Petition for Discretionary Review was denied by the Kentucky Supreme Court on March 4, 1992.

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky was not published but appears in the appendix hereto. The opinion of the Court of Appeals of Kentucky affirmed a judgment of conviction of the Petitioner for Second Degree Manslaughter in violation of Kentucky Revised Statutes 507.040. The Petitioner was sentenced to a term of five (5) years by a jury verdict.

JURISDICTION

The decision of the Court of Appeals of Kentucky was rendered August 30, 1991. The Order of the Supreme Court denying Discretionary Review was entered March 4, 1992.

Jurisdiction of this Court is invoked under 28 U.S.C.S. § 2104.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six: United States Constitution

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATUTES AND RULES INVOLVED

K.R.S. 507.040 Manslaughter in the second degree

(1) A person is guilty of manslaughter in the second degree when, including, but not limited to, the operation of a motor vehicle, he wantonly causes the death of another person.

(2) Manslaughter in the second degree is a Class C felony.

STATEMENT OF THE CASE

On the evening of August 24, 1982, Cleve Branham, deceased, Clarence Roberts and Steve Miller gathered near the home of an elderly gentleman named Willard Newsome who lived near Dorton, Pike County, Kentucky. Mr. Newsome overheard a conversation while the young men were drinking beer wherein they were discussing stealing a battery form a truck owned by the Appellant, O. J. Collins. Mr. Newsome observed the three (3) drinking beer, smoking marijuana and discussing the theft in order to buy more marijuana and beer. (Transcript of Evidence pp. 69-76, hereinafter referred to as T. of E.).

Clarence Roberts, age twenty-eight (28) years, testified that he was with Cleve Branham, deceased, and proceeded to the Collins' home to break into the Collins' truck and steal a battery. The plan related by Clarence Roberts was to let Cleve Branham off near the truck and to drive up the road and return and pick up Branham with the battery. During the time Roberts and Miller were driving up the highway to turn around, Branham was hit by a deer slug from a .20 gauge Browning shotgun fired by O. J. Collins. (T. of E. pp. 76-83).

Steve Miller gave the same testimony and stated that it was their plan to go to the Collins' residence to steal for money to buy marijuana and beer. (T. of E. pp. 86-103).

The case was presented to a Pike County Grand Jury by Officer Fred Bailey of the Kentucky State Police in approximately December, 1982, and the Grand Jury declined to indict. The family of the deceased subsequently appeared before a Grand Jury along with Officer Bailey and a second Grand Jury returned an indictment on June 5, 1984, and this cause came to trial on September 7, 1989, and the Appellant was convicted of the offense of second degree manslaughter and sentenced to a term of five (5) years.

O. J. Collins' testimony is contained on Pages 117-147, in which Collins describes the events which lead up to his firing the shots which struck Cleve Branham. Mr. Collins had many break-ins in and around his home resulting in damage to his truck and other property. Mr. Collins himself was fifty-eight (58) years of age at the time and suffering from diabetes which subsequently led to the loss of both legs. His wife was living with him but was deceased after drowning in a flood in May, 1984.

There were no near neighbors nor any police readily available for response within a reasonable time. The setting was essentially rural with no local police outside the Kentucky State Police which patrolled the area on an irregular, unscheduled basis.

REASON FOR GRANTING WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. The State of Kentucky's failure to indict the Defendant within eighteen (18) month of a shooting denied the Petitioner a speedy prosecution under the Sixth Amendment of the United States Constitution..

The offense charged occurred on October 24, 1982, at which time the Appellant was not arrested. A subsequent Pike Circuit Court grand jury passed on the merits of the case with Officer Detective Bailey appearing before the Grand Jury and the Pike Grand Jury declined to indict. Some eighteen (18) months after the event, the family of the deceased along with Officer Bailey appeared before the Pike Circuit Court Grand Jury and the Appellant was charged with homicide.

During the interim between the first Grand Jury and the second Grand Jury, a time lag of approximately sixteen months, the Appellant's wife drowned during the flooding of a creek near their home.

The Appellant assigns as error the time lag between the time of the event and the actual prosecution some eighteen (18) months later and the actual trial of the case. The error was preserved by motion of the Appellant to dismiss on Pages 6-16 of the transcript prior to any evidence being presented. A review of the transcript of the case indicates the facts are rather simple and require very little investigation. The testimony of Officer Bailey and the two (2) accomplices who went with the deceased to rob the Appellant were the substance of the testimony.

The offense charged was not technical, complex or otherwise difficult. Had the case been presented within six (6) months to twelve (12) months after the events, the Appellant's evidence would have been fresh and he would have had the supporting testimony of his wife who was later unavailable due to her death.

In Cain v. Smith, 686 F. 2d 374 (Sixth Circuit, 1982), the length of delay begins with the earlier occurrence, either the arrest or indictment and this case should be categorized with the case in Cain as a simple case to investigate. The Court in Cain felt the unexplained delay is weight against the prosecution and keeping a Defendant under indictment for an extended period is not an accepted standard by the Cain Court.

In West v. Black, 383 Fed. Supp. 1256 (1974), a Federal habeas corpus action out of the Western District of Kentucky, indictments out of Jefferson County were dismissed for failure to timely prosecute and for failure to afford a speedy trial.

In United States v. Greene, 737 F.2d 572 (Sixth Circuit, 1984), although affirming a denial of the Appellant's appeal, the passage of time was discussed as an impairment and a violation of due process rights if there was actual prejudice, i.e., loss of testimony, memory or physical evidence.

Appellant realizes the distinction of a speedy trial under the Sixth Amendment of the United States Constitution and failure to timely prosecute under the due process clause of the Fifth Amendment, however, the Appellant has suffered from a failure to timely prosecute and the oppressiveness of waiting seven (7) years for trial.

United States v. Lavasco, 431 U.S. 783, 97 S.Ct. 2044 (1977), approved an eighteen (18) months delay, however, there was an investigation delay because the charge involved more than one defendant and could have let to the discovery of other charges.

In United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, Justice White approved an indictment returned three (3) years after the United States gained knowledge of the offense but again there was an ongoing investigation involving a conspiracy to commit crimes as well as the crime. However, Justice White's opinion stated "there may be cases where due process may require dismissal if prejudice is shown and the defendant's right to a fair trial is impaired."

Certainly, the supporting testimony of the Appellant's wife as to her fear and anxiety of robbery would have affected the jury and created a reasonable doubt for at least some jurors, if not all.

CONCLUSION

For the foregoing reasons, and because of the cumulative effect of the error, United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, the Petitioner respectfully requests that the Judgment of the trial Court be reversed and a new trial granted.

W. SIDNEY TRIVETTE
P. O. Box 2744
Pikeville, Kentucky 41502

I, W. SIDNEY TRIVETTE, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari was this day mailed to the Hon. Chris Gorman, Attorney General, Bush Building, 403 Wapping Street, Frankfort, Kentucky 40601; Hon. John Paul Runyon, P. O. Box 776, Pikeville, Kentucky 41502; and, Hon. Bayard V. Collier, Trial Judge, 89 Division Street, Suite 435, Pikeville, Kentucky 41501, this the 10th day of July, 1992.

W. SIDNEY TRIVETTE

APPENDIX

	Page
A. Opinion of the Court Below	1a-3a
B. Order of the Court Below Denying Petition for Rehearing	4a

OPINION RENDERED: August 30, 1991; 3:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 89-CA-002534-MR

O. J. COLLINS — APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE BAYARD V. COLLIER, JUDGE
ACTION NO. 84-CR-000132

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING

* * * * * * * *

BEFORE; EMBERTON, HOWERTON and MILLER, Judges.
EMBERTON, JUDGE: This is an appeal from a judgement entered following a jury verdict finding the appellant, O. J. Collins, guilty of second-degree manslaughter. Appellant maintains that the judgment should be reversed because of the Commonwealth's failure to timely prosecute the charges against him. We disagree and affirm the trial court.

On October 24, 1982, appellant shot and fatally wounded eighteen-year-old Cleve Branham, who was allegedly attempting to steal a battery form appellant's automobile. Shortly after the incident, the case was brought before the Pike County Grand Jury, but an indictment was not returned. In March, 1984, the case was again brought before the Grand Jury

and, on June 5, 1984, and indictment was returned charging appellant with murder in the slaying of Cleve Branham. Appellant was arraigned on June 11, 1984, at which time he entered a plea of not guilty.

Subsequently, on May 6, 1986, November 2, 1988, and February 6, 1989, appellant made three separate motions for a continuance. Ultimately, he was tired on September 7, 1989, and convicted of second-degree manslaughter.

The record reveals that during the pre-trial proceedings, appellant made a motion to dismiss on the grounds of the Commonwealth's failure to timely prosecute. While appellant persists on appeal in designating the alleged error as "failure to timely prosecute," we interpret his argument to be two-fold; specifically, that he was denied due process guaranteed by the Fifth Amendment because of the "preindictment delay," United States v. Lovasco, 431 U. S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), and he was denied a speedy trial guaranteed by the Sixth Amendment. Barker v. Wingo, 407 U.S. 5114, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

In Reed v. Commonwealth, Ky., 738 S.W.2d 818 (1987), the court held that while preindictment delay does not trigger the speedy trial protections of the Sixth Amendment, it may have Fifth Amendment implications:

> Notwithstanding the foregoing, in a proper case, unjustified and prejudicial delay may constitute a due process violation which requires dismissal. This proposition was established in United States v. Marion, supra, but the court held that in the absence of "substantial prejudice" and "intentional delay to gain tactical advantage," no due process violation would be found. In Payne v. Commonwealth, Ky., 597 S.W.2d 147 (1980), this court held that a showing of actual prejudice was required to constitute a due process violation. (citations omitted).

In the present case, appellant generally asserts that he was prejudiced by the preindictment delay because his wife, who died in May, 1984, would have been available to testify at an earlier date. According to appellant, his wife would have testified as to her fear and anxiety of robbery. This speculation falls well below the substantial prejudice standard required in Reed, supra. Even assuming her testimony would have been as appellant surmises, we do not believe it was so probative as to affect the outcome of the case. Her testimony only would have reiterated that of appellant's and, as his wife, would presumably have been viewed as biassed by members of the jury. Appellant's speculation as to how his wife's testimony would have affected the jury verdict does not amount to the showing of actual prejudice. Reed, supra.

In addition, there is no allegation or indication that the Common-

wealth intentionally failed to seek an indictment to gain a tactical advantage. Reed, supra. The record reveals that the prosecutor sought an indictment shortly after the incident but the grand jury failed to indict. He then successfully brought the case before a second grand jury. There being no showing of substantial prejudice and an intentional delay by the Commonwealth to gain a tactical advantage, there was no error in the trial court's refusal to dismiss the indictment. Reed, supra.

There was, between the time of the indictment and the trial, a passage of five years. However, when considering speedy trial concerns under the Sixth Amendment, passage of time is but one factor. The reasons for delay, the defendant's assertion of his speedy trial right, and prejudice to the defendant, are factors to considered by the court. McDonald v. Commonwealth, Ky., 569 S.W.2d 1134 (1978), U.S. cert. denied, 439 U.S. 1119 (1979). In this case, the delay, while prolonged, is attributable to the actions of appellant, He did not seek a speedy trial and, in fact, on three separate occasions moved for a continuance.

Based on the foregoing the judgment of the Pike Circuit Court is affirmed.

HOWERTON, JUDGE, CONCURS.
MILLER, JUDGE, DISSENTS.

ATTORNEY FOR APPELLANT:

W. Sidney Trivette
Pikeville, Kentucky

ATTORNEYS FOR APPELLEE:

Frederic J. Cowan
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky

SUPREME COURT OF KENTUCKY

91-SC-898-D
(89-CA-25334)

O. J. COLLINS — MOVANT

v. PIKE CIRCUIT COURT
No. 84-CR-132

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Combs and Leibson, JJ., would grant review.

ENTERED March 4, 1992.

Robert F. Stephens

Chief Justice